APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Each motion should be accompanied by a supporting affidavit with statement of issues. (Local Rule 27(a)) Include brief statement of facts with page references to the moving papers.

UNITED STATES OF AMERICA, 97-1513
Docket Number

-against-

KIMBERLY GOODMAN
Defendant.

MOTION INFORMATION FORM

Motion for Stay of Sentence

MOTION BY:(*Name, address and tel.no. Of law firm and of attorney in charge of case*)

Raymond J. Aab & Carol Kahn
233 Broadway
New York, New York 10279
212-406-1700

Has consent of opposing counsel:
A. been sought? __yes __no
B. been obtained? ___yes __no

Has service been effected?__yes___no

Is oral argument desired? __yes ___no
(Substantive motions only)

Requested return date: 5/11/99
(See Second Circuit rule 27(b).)

Has argument date of appeal been set:
A. by scheduling order?
___yes ___no
B. by firm date/argument notice?
___yes ___no

C. if yes, enter date:_____

OPPOSING COUNSEL: (*Name, address and tel.no. Of law firm and of attorney in charge of case*)
AUSA Anthony Bruce
138 Delaware Avenue
Buffalo, N.Y. 14202
716-551-4811

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ____yes ____no
(See F.R.A.P Rule 8)

Any previous request for similar relief made to the 2nd Circuit? ____yes ____no

Would expedited appeal eliminate need for this motion? ____yes ____no

If no, explain why not:
The relief sought is for a stay pending determination for certiorari to US S. Ct.

Will the parties agree to maintain the status quo until the motion is heard? ____yes ___no

Judge or agency whose order is being appealed: Sentencing by D.J. Richard Arcara (WDNY)

Brief statement of relief requested: Stay of sentence pending determination by the U.S. Supreme Court of Appellant's petition for certiorari. The U.S.D.C has previously stayed the execution of the sentence pending appeal to the Second Circuit, which denied the appeal in a published decision.

By: (Signature of Attorney) Signed name must be printed beneath.	Appearing for: (Name of Party) RAYMOND J. AAB & CAROLE KAHN
	Appellant or Petitioner: _Plaintiff X Defendant
Date:	Appellee or Respondent: _Plaintiff_ Defendant

ORDER

Kindly leave this space blank.

BEFORE:

IT IS HEREBY ORDERED that the motion be and it hereby is granted denied.

For the Court:
CAROLYN CLARK CAMPBELL, CLERK

Date

By

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

-against-

Docket No. 97-1513
AFFIRMATION

KIMBERLY GOODMAN,
Defendant.

RAYMOND J. AAB, an attorney duly admitted to practice in the Courts of New York, affirms the following under penalty of perjury:

1. This affirmation is submitted in support of the Appellant Kimberly Goodman's motion for a stay of the execution of sentence pending consideration by the United States Supreme Court of Appellant's petition for a writ of certiorari, from the decision of this court dated March 18, 1999, denying her appeal after rehearing. By notice from the United States Marshall's Service dated April 26, 1999, Ms. Goodman was directed to surrender herself to begin her incarceration on May 13, 1999. Appended hereto as Exhibit "A" is a copy of the Marshall's notice.

2. Following Ms. Goodman's conviction after plea, the trial court sentenced her to 30 months, and stayed the execution of that sentence until the appeal to this court was concluded. This Court subsequently denied the appeal and Appellant then made an application to the trial court for a continuation of the stay pending a determination by the United States Supreme Court of Appellant's petition for certiorari. The trial court denied that motion in a written decision filed on April 21, 1999, a copy of which is appended hereto as Exhibit "B".

3. The facts in this case were presented to this Court in the appeal and motion for rehearing of that appeal, and Appellant respectfully refers to the record of that appeal for a full recitation of the facts.

4. Affirmant believes that meritorious issues for appeal are

present in this case as detailed in the draft of Appellant's petition for a writ of certiorari. A copy of that draft petition is appended hereto as Exhibit "C". Although this court has considered some of the issues to be presented to the Supreme Court, it has not addressed all of the issues being presented to that Court, as these issues were previously raised before this Court. Specifically, the writ petition raises an issues addressed by the Supreme Court subsequent to this appeal concerning a defendant's right to Fifth Amendment protection at sentencing proceedings. See, Mitchell v. United States, 119 S.Ct. 1307 (1999). The writ petition also raises the issue of the defendant's right to counsel at a pre-sentence interview before the U.S. Probation Officer, a material aspect in this case because the trial court used the Appellant's statements to the interviewing probation officer as a basis for denying her a two point reduction for acceptance of responsibility.

5. No prejudice will result to the government if the stay of the sentence is continued pending the Supreme Court's determination of Appellant's writ petition. Under Supreme Court Rules, the writ petition must be submitted by June 18, 1999, and it will be submitted within approximately two weeks time. And, the government acknowledges that Appellant is not a risk of flight or a threat to the community.

WHEREFORE, Appellant respectfully requests that the Court stay the execution of her sentence until the Supreme Court determines her petition for certiorari.

Dated: New York, N.Y.
April 29, 1999

RAYMOND J. AAB and
CAROL KAHN
Attorneys for Appellant
233 Broadway
New York, N.Y. 10279
212-406-1700

To:
U.S. Attorney, WDNY

Exhibit A

U. S. Department of Justice
United States Marshals Service
Western District of New York
Buffalo, New York 14202
CM# P3171962 4 0
April 26, 1999

Kimberly Goodman
66 West Park Road
Grand Island, New York 14072

Dear Ms. Goodman:

The United States Bureau of Prisons has designated the FPC ALDERSON at Alderson, West Virginia, per court order 96 CR 115 001 dated August 20, 1997, signed by Richard J. Arcara, United States District Judge. You will voluntarily surrender yourself to this institution on May 13, 1999, no later than 2:00 P.M.

Sincerely,

JOHN P. Mc CAFFREY
U.S. MARSHAL

BY: James A. Alduino
Chief Deputy U.S. Marshal

JPM: JAA : sdo
CC. Joseph B. Mistrett, AFPD
300 Pearl Street, Suite 450
Buffalo, New York 14202
CM#P317196241
Herbert L. Greenman, Esq.
42 Delaware Avenue, Suite
Buffalo, New York 14202
CM#P317196242

Exhibit B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v. DECISION AND ORDER
96-CR-O115A

KIMBERLY GOODMAN,
Defendant.

INTRODUCTION

On October 3, 1996, defendant Kimberly Goodman waived indictment and plead guilty to a one-count information charging her with mail fraud, in violation of 18 U.S.C. § 1341. On August 20, 1997, the Court sentenced defendant to 30 months imprisonment. Judgment was entered on August 27, 1997. Defendant filed a notice of appeal on September 3, 1997. On September 30, 1997, defendant filed a motion to stay execution of her sentence pending appeal. On October 7, 1997, the Court granted defendant's motion.

On appeal, defendant challenged the Court's denial of her motion to withdraw her plea of guilty and two aspects of the calculations under the United States Sentencing Guidelines ("U.S.S.G."). On January 20, 1999, the Second Circuit Court of Appeals affirmed defendant's conviction and sentence in all respects. See United States v. Goodman, 165 F.3d 189 (2d Cir. 1999). Prior to the issuance of the mandate on March 18, 1999, and issued the mandate on March 25, 1999. The mandate was received and filed in this Court on March 29, 1999.

On April 1, 1999, defendant moved this Court, pursuant to Fed. R. App. F. 8(a)(1)(A) and Supreme Court Rule 23(3), for an order staying the execution of her sentence pending a petition for writ of certiorari before the United States Supreme Court. The government filed a response in opposition to defendant's motion on April 8, 1999, and defendant filed a reply affidavit on April

12, 1999.

After reviewing the submissions of the parties, the Court hereby denies defendant's motion to stay execution of sentence.

DISCUSSION

18 U.S.C. § 1343(b) governs the release or detention of a defendant pending appeal or a petition for writ of certiorari[1] Section 3143(b)(1) provides, in pertinent part, that:

> The judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds- (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in- (i) reversal, (ii) an order for a new trial, (iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

Section 1343(b) creates a presumption against post-conviction release pending appeal. See United States v. Barth, 1996 WL 684389 (D. Conn. May 22, 1996).

Applying the criteria in § 1343(b) to the instant case, the Court finds that defendant should not be released pending her

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[1](Defendant brought her motion under Fed. R. App. P.8(a)(1)(A). Fed. R. App. P. 8(c) states that in a criminal cacase, a stay of execution of sentence is governed by Fed. R. Crim. P. 38. Fed. R. Crim. P.38 in turn refers to Fed. R. App. P. 9. Fed. R. Apo. P. 9(c) provides that the Court must make its decision regarding release in accordance with the applicable provision of 18 U.S.C. §§ 3142, 3143 and 3145(c). Sections 3142 and 3145(c) are not applicable to the circumstances present here.

petition for a writ of certiorari. Based on the record, including the Second Circuit's opinion affirming defendant's conviction, the Court concludes that it is improbable that defendant can raise a substantial question of law or fact on her petition for writ of certiorari likely to result in any of the consequences listed in §1343(b)(1)(B). The claims of error that defendant states she will assert in her petition for certiorari are not constitutional in nature and do not involve issues of statutory construction. Rather, the issues that she plans to raise would require the Supreme Court to review this Court's denial of her motion to withdraw her plea for an abuse of discretion and the application of the U.S.S.G. to determine whether the Court's findings of fact were clearly erroneous. Supreme Court Rule 10 provides that "[a] petition for a writ of certiorari will be granted only for compelling reasons" and "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

The fact that the Second Circuit has affirmed defendant's conviction and denied her petition for rehearing, the nature of the grounds of her petition for a writ of certiorari, and the Supreme Court's policy against reviewing such cases all weigh against defendant's release pending her petition for writ of certiorari.

CONCLUSION

For the reasons stated, defendant's motion for stay of execution of sentence is denied in all respects. Defendant shall voluntarily surrender in accordance with instructions given to her by the United States Marshals Service.

IT IS SO ORDERED.

HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT COURT

Dated: April 21, 1999